STATE OF MICHIGAN

COURT OF APPEALS

RONALD O. ROSS,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, d/b/a MICHIGAN SCHOOL FOR THE DEAF & BLIND,

Defendant-Appellee,

and

JOHN CHERNIAWSKI,

Defendant.

UNPUBLISHED
December 15, 2000

No. 213670
Genesee Circuit Court
LC No. 97-056524 CL

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant State of Michigan, doing business as Michigan School for the Deaf and Blind (hereinafter "defendant"),[1] summary disposition regarding plaintiff's age, race and handicap discrimination claims. We affirm.

From 1973 until his employment was terminated on March 26, 1996, plaintiff worked for defendant as a night watchman. On March 17, 1996, Alexander Davlantes, the school's executive director, saw plaintiff during his work shift sitting at his supervisor's desk, leaning back in a chair with his feet up and his glasses and shoes removed. Davlantes testified in his deposition that plaintiff appeared to be and admitted that he was sleeping, but plaintiff later claimed he merely was resting. After an investigation, plaintiff was discharged for inattentiveness to his duties, based on the March 17 incident and his prior disciplinary record.

Plaintiff contends that summary disposition was improperly granted because genuine issues of material fact concerning his age, race and handicap discrimination claims were in dispute. This Court reviews de novo a trial court's summary disposition ruling. *Zurcher v Herveat*, 238 Mich App 267, 275; 605 NW2d 329 (1999). When reviewing a motion brought pursuant to MCR 2.116(C)(10), we consider the entire record, viewing the evidence in the light most favorable to the nonmoving party, to determine whether summary disposition was appropriate. *Id*. A motion pursuant to this rule is properly granted when, except regarding damages, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Lown v JJ Eaton Place*, 235 Mich App 721, 726-727; 598 NW2d 633 (1999).

[1] Pursuant to the parties' stipulation, John Cherniawski, plaintiff's immediate supervisor, was dismissed as an individual party defendant.

With respect to plaintiff's age discrimination claim, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) precludes an employer from discharging an employee because of his age. A plaintiff claiming direct evidence of intentional age discrimination must show that he was a member of a protected class, he was discharged or otherwise discriminated against with respect to his employment, the defendant was predisposed to discriminate against persons in the class, and the defendant acted on that disposition in making the employment decision. *Downey v Charlevoix Co Bd of Co Road Comm'rs*, 227 Mich App 621, 632; 576 NW2d 712 (1998). Direct evidence of discriminatory animus is "evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor" in the defendant's adverse employment action. *Id*. at 633. Summary disposition generally is precluded if the plaintiff presents "direct proof that the discriminatory animus was causally related to the decisionmaker's action." *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997).

Plaintiff testified that every other day from 1992 until 1996 his immediate supervisor, John Cherniawski, told plaintiff that he should retire and that he was too old to handle tasks he previously performed. To sustain his claim, however, plaintiff had to present direct evidence that Cherniawski's alleged discriminatory animus was causally related to defendant's termination of plaintiff. *Harrison*, *supra*. The instant record reveals that Cherniawski had no involvement in the March 17 incident that precipitated plaintiff's discharge. Gerald Brazil, director of the Department of Education's Lansing Office of Human Resources, made the ultimate decision to terminate plaintiff's employment, relying on the recommendations of school superintendent Brian McCartney and Davlantes.

To the extent that Brazil's decision to terminate plaintiff also was based on plaintiff's overall disciplinary record, to which Cherniawski contributed, plaintiff failed to present evidence that Cherniawski's participation in the several prior disciplinary actions concerning plaintiff involved his alleged discriminatory animus. In November 1995, plaintiff received a three-day suspension for reporting to work under the influence of alcohol after he admittedly consumed approximately five drinks before his shift, arrived smelling of alcohol, and on his arrival set off a school building alarm. On two subsequent occasions, December 23, 1995 and January 19, 1996, plaintiff undisputedly failed to report for his shift or to notify his supervisor that he would be absent. For these incidents, plaintiff received respectively a five-day suspension and a formal counseling memorandum from Cherniawski. Plaintiff never contested any of the punishments he received. Thus, the record contains unrebutted evidence of plaintiff's four disciplinary actions within approximately five months.[2]

Because (1) the record indicates that Brazil, who denied knowing plaintiff's age, race or physical condition, made the ultimate decision to terminate plaintiff, and (2) absolutely no indication exists that plaintiff's disciplinary record reviewed by Brazil contained some incident or information attributable to Cherniawski's alleged discriminatory animus, we conclude that the trial court properly granted defendant summary disposition of plaintiff's age discrimination claim pursuant to MCR 2.116(C)(10).[3]

Regarding plaintiff's race discrimination claim, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) also provides that an employer shall not discriminate against an individual because of race. Absent direct evidence of

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[2] While plaintiff repeatedly emphasizes his denial that he was sleeping when Davlantes discovered him on March 17, 1996, whether plaintiff in fact was asleep does not appear relevant to our age discrimination analysis. Plaintiff undisputedly was laid back and relaxing with his feet on a chair, and Davlantes perceived plaintiff to be asleep. As Brazil explained, however, plaintiff's fourth violation of defendant's employee handbook was not officially determined to have been that he was asleep during his shift, but that he was inattentive to his duties.

[3] Plaintiff also failed to establish a prima facie pretextual claim of age discrimination. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999). Plaintiff provided absolutely no evidence that defendant hired a younger individual to fill plaintiff's night watchman position, and offered only speculation that defendant might hire a replacement night watchman. *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999); *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Moreover, defendant offered its legitimate, nondiscriminatory reasons for terminating plaintiff's employment, and plaintiff established no triable issue that discriminatory animus represented a motivating factor underlying the adverse employment action. *Hall*, *supra* at 370-371.

discriminatory animus, to establish a discrimination claim under this section, the plaintiff must prove that he was a member of the protected class, he suffered an adverse employment action, he was qualified for the position, but he was discharged under circumstances that give rise to an inference of unlawful discrimination. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360-361; 597 NW2d 250 (1999). Once the plaintiff establishes a prima facie case, the employer has the burden of articulating a legitimate, nondiscriminatory reason for the adverse employment action. *Harrison*, *supra* at 608. When the employer provides such evidence, the burden shifts back to the plaintiff. In the context of summary disposition, a plaintiff must prove discrimination with admissible evidence sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 174-176; 579 NW2d 906 (1998).

Plaintiff claims he was treated differently than Caucasian employees, specifically Cherniawski, who engaged in similar behavior and were not terminated. Plaintiff failed to establish, however, that all of the relevant aspects of Cherniawski's employment situation were nearly identical to plaintiff's. *Wilcoxon*, *supra* at 370. While plaintiff claims that defendant did not discipline Cherniawski for leaning back and relaxing with his feet up, we note that plaintiff did not show that both he and Cherniawski possessed similar positions and duties or that defendant ever found Cherniawski to be inattentive to his duties. Furthermore, plaintiff presented no evidence of defendant's dissimilar treatment of a nonAfrican-American person possessing a similar record of work rule violations.[4] In the absence of any indication that plaintiff was treated differently than other, similarly situated employees or that race played any role whatsoever in defendant's decision making, we conclude that the trial court correctly granted defendant summary disposition regarding the race discrimination claim pursuant to MCR 2.116(C)(10).

Lastly, plaintiff contends genuine issues of material fact existed regarding his handicap discrimination claim. Under the Persons With Disabilities Civil Rights Act (the "Act"), an employer cannot

> [d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position. [MCL 37.1202(1)(b); MSA 3.550(202)(1)(b).]

Absent direct evidence of discriminatory animus, to establish a prima facie case of discrimination under the Act, a plaintiff must demonstrate (1) that he is handicapped as defined by the Act, (2) that the handicap is unrelated to his ability to perform his job's duties, and (3) that he was discriminated against in one of the ways described in the statute. *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998).

Plaintiff suggests he was handicapped according to the Act because defendant regarded him as having a determinable physical disability. MCL 37.1103(d)(iii); MSA 3.550(103)(d)(iii). While plaintiff's testimony suggested that Cherniawski became aware that in 1992 plaintiff suffered a heart attack, no evidence suggested that on this basis Cherniawski perceived plaintiff as disabled. Any comments Cherniawski allegedly made about plaintiff's physical abilities related only to plaintiff's age, not to any perceived medical condition. Thus, plaintiff failed to show that Cherniawski or anyone else who may have acted on defendant's behalf perceived him to have an impairment that substantially limited a major life activity. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 475; 606 NW2d 398 (1999).

Plaintiff alternatively argues that his heart condition qualified as a disability under the statute because he had a history of a determinable physical characteristic that impaired his ability to work. MCL 37.1103(d)(i)(A);

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[4] Plaintiff continues that "[a]s further evidence of race discrimination, a white individual, Gerald Proulx, was hired into Plaintiff-Appellant's former department." Defendant's hiring of Proulx is in no way relevant to the instant case, however, because the undisputed record establishes that defendant hired Proulx as a mechanic, not a night watchman. Proulx did not replace plaintiff, nor were Proulx and plaintiff somehow similarly situated. Plaintiff additionally states the fact that "another white employee, Dennis McKay, is performing the same night watchman functions as Plaintiff-Appellant." The record reveals that McKay began working for defendant in the early 1970's, however, and plaintiff absolutely fails to indicate that he and McKay were similarly situated.

MSA 3.550(103)(d)(i)(A). To qualify as a disability, the substantial impairment must affect a major life activity, which is defined as a "function[] such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Lown*, *supra* at 728. Plaintiff specifically testified, however, that after his heart attack he returned to work under no restrictions and that he was able to perform every aspect of his job. To the extent that plaintiff suggests that he was disabled because he took three weeks of sick leave in 1992 and was unable to work during that period, such a temporary illness, with no evidence of any residual physical impairment, does not constitute a disability under the Act. *Lown*, *supra* at 733-734; *Chiles*, *supra* at 480-482. Because plaintiff failed to establish a prima facie case of handicap discrimination, we conclude that the trial court appropriately granted summary disposition of this claim.[5]

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[5] We note that even if plaintiff's condition qualified as a disability under the statute, plaintiff failed to show that defendant's reasons for terminating him were pretextual. Plaintiff presented no evidence of any causal connection between any real or perceived disability and his termination. The evidence showed he was discharged for work rule violations, not an inability to perform any work related activity with or without an accommodation.